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May 3 1982
ARIZONA ATTORNEY GENERAL

Mr. James A. Shiner
Stompoly & Even, P.C.
Attorneys at Law
120 West Broadway, Suite 370
Tucson, Arizona 85703

Re: I82- 056 (R82-039)

Dear Mr. Shiner: .

Pursuant to A.R.S. § 15-253.B, we decline to review your opinion dated March 19, 1982, to the Superintendent of the Sunnyside Unified School District concerning a school board policy pertaining to the release of school district records. We note, however, that disclosure of the use to which a public record will be put is required pursuant to A.R.S. § 39-121.03.

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

BC:GLL:ta

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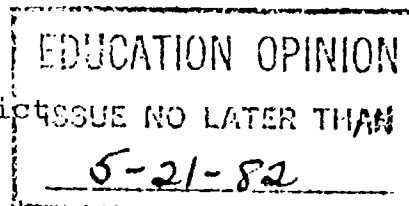
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March 19, 1982

Mr. Fred Bull, Superintendent
Sunnyside Unified School District
Post Office Box 11280
Tucson, Arizona 85734



3-24-82 pc
LOWE
R82- 039

Re: Release of School District Records

Dear Mr. Bull:

This correspondence is in response to your request for my review and opinion of the following proposed policy pertaining to the release of school district records:

"In order that the District shall fully comply with the applicable State and Federal laws regarding the release of information, both under the statutes which concern rights of privacy and the rights of freedom of information, all requests for information and documents concerning the activities, records and policies of this school district, shall be directed to the superintendent.

Such requests shall be made in writing, setting forth the exact nature of the information desired, and the use for which it is intended. The request shall be signed by the person making the request. Those making requests for information from particular schools shall be referred to this policy, and the request shall be directed to the superintendent. The superintendent may designate an assistant superintendent to care for such requests.

A record of all such requests and the reply to the request, shall be maintained.

All requests made by members of the Board shall be reported to the Board, and the other members of the Board shall be supplied with the information given to the member who made the request."

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The primary regulatory provisions applicable to the release and inspection of school district records are A.R.S. §§15-141 and 39-121. In addition, A.R.S. §38-431.01(C) 438-01(C) deals with the release of the minutes of the school board meetings.

A.R.S. §15-141 governs the right to inspect and review educational records and the release or access to such records. Section 15-141 adopts by reference the standards set forth in the Family Educational Rights and Privacy Act, Title XX, United States Code §§1232G and 1232H. The Federal regulations issued pursuant to §§1232G and 1232H can be found in 45 C.F.R. Part 99. The proposed policy does not conflict with these provisions. In fact, 45 C.F.R. §99.5 (a) specifically authorizes the adoption of a policy setting forth the procedure by which a parent or eligible student¹ may request the right to inspect the student's records.

A.R.S. §39-121 deals with public access to the records of all state agencies and political subdivisions of the state, which includes this School District. Section 39-121 provides:

"Public records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person."

The mere characterization of a record as a "public record or other matter" does not immediately mandate release of that record or matter. It has been held that the proper way to view all requests for information is to determine whether or not release of the information requested would have an important and harmful effect on the official duties of the official or agency. Church of Scientology v. City of Phoenix Police Department, 122 Ariz. 338, 594 P.2d 1034 (CTAPP 1979); Op. Atty. Gen. No. R75-781, page 141. An agency may restrict access to public records if the "best interests" of the state would be served by the restriction. Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1953).

¹If adopted, the policy must be available under the terms of 45 C.F.R. 99.5(b) and there must be annual notification pursuant to 45 C.F.R. 99.6.

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The determination that a record is a public record or other matter and available for public scrutiny must first be made by the officer or agency who is custodian of the record sought to be obtained. Op. Atty. Gen. No. ⁷⁵⁻⁷⁸¹ at 144. Damages and attorney's fees may be assessed if the officer or agency ⁷⁵⁻⁷⁸¹ wrongfully withholds access to the records. Op. Atty. Gen. No. ⁷⁵⁻⁷⁸¹ at 144; A.R.S. §39-121.02(B).

The proposed policy, with the exception of the phrase "and the use for which it is intended" as set forth in the first sentence of the second paragraph, does not appear to conflict with §39-121. On the other hand, the requirement that the intended use of the materials requested be disclosed constitutes a requirement not contained in A.R.S. §39-121 on the disclosure of public records and is, therefore, impermissible as the State in enacting §39-121 has appropriated the field. Phoenix Respirator & Ambulance Service, Inc. v. McWilliams, 12 Ariz. App. 186, 468 P.2d 951 (1970). The remainder of the policy, however, provides a mechanism for implementation of §39-121 and is, therefore, not inconsistent with that provision.

The Arizona Open Meeting Law is set forth in A.R.S. §38-431, et seq. Section ~~38-348-01(c)~~ ^{38-431.01(c)} provides:

"The minutes or recording shall be open to public inspection three working days after the meeting except as otherwise expressly provided in this article."

Since this provision requires that Board minutes "be open to public inspection," it could be argued that the procedure established by the proposed policy violates the Arizona Open Meeting Law inasmuch as strict adherence to the policy would mean Board minutes would be available only on request. It has, however, been the practice of the District to print copies of the Board's minutes and make them available at designated locations without request. I presume this practice would continue.

The final point is whether or not the Board may designate the superintendent as the proper party to handle information requests. The primary authority in Arizona dealing with the power and authority of a superintendent is Godbey v. Roosevelt School District No. 66, ___ Ariz. App. ___, 638 P.2d 235 (1981). In Godbey it was expressly recognized that "the Board may delegate to the superintendent, without express legislative authorization, certain day-to-day administrative tasks." Id at 241. The distinction

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between those items which may be delegable to a superintendent and those which are not delegable, in the absence of an express statutory authority is set forth in Godbey as follows:

"If the action of the superintendent is characterized as 'ministerial or administrative', then the power was delegable without express legislative authorization. If the action is characterized as 'legislative or judicial' then the power was not so delegable." 638 P.2d at 241-242.

The proposed policy simply states that all requests "shall be directed to the superintendent." It does not state that the superintendent will determine which requests will be honored and which requests will be denied. The policy apparently presumes that the superintendent will act within the area of his authority and will grant or deny requests when a mere administrative or ministerial type of action is required. Where a determination of a judicial or legislative nature is required, the superintendent may refer the request to the Board.

This opinion is being forwarded to the office of the Attorney General for concurrence or review pursuant to A.R.S. §15-436(b). Unless circumstances require immediate action upon this opinion, you should await my forwarding to you the response of the Attorney General before acting upon the opinion set forth above.

Very truly yours,



James A. Shiner

JAS:law